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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 512

WILLIAM A. LYON, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE BUSINESS AND PROPERTY IN THE STATE OF NEW YORK OF YOKOHAMA SPECIE BANK, LTD., PETITIONER

v.

EUGENE T. SINGER

No. 527

EUGENE T. SINGER, PETITIONER

v.

YOKOHAMA SPECIE BANK, LTD., AND WILLIAM A. LYON, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE BUSINESS AND PROPERTY IN THE STATE OF NEW YORK OF YOKOHAMA SPECIE BANK, LTD.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

This case is here on petition and cross-petition filed respectively by the Superintendent of Banks

of the State of New York (hereinafter referred to as "the Superintendent") and by Eugene T. Singer (hereinafter referred to as "plaintiff"). The facts are fully set forth in the brief of the Superintendent. We shall, therefore, make only a summary statement of the procedural context in which the federal issues raised by this case are presented.

The proceeding arises in the course of the liquidation, pursuant to the Banking Law of the State of New York, of the New York Agency of the Yokohama Specie Bank. In the plaintiff's action against the Superintendent it sought to have its claim to $557,561.25 recognized and paid as a preferred claim out of the assets of the Agency then held by the Superintendent as statutory liquidator. Under the relevant provisions of section 606 (4) of the State's Banking Law plaintiff can, as a matter of New York law, prevail only by establishing that his claim arose out of a transaction with the New York Agency. The New York Court of Appeals has held that plaintiff has established such a transaction with the Agency and that his claim is accordingly entitled to be recognized as a preferred claim. That holding presents a number of issues for this Court relating to the effect on the rights of the parties of the federal regulations adopted, and administrative action taken, pursuant to Section 5 (b) of the Trading with the Enemy Act. The posi-

tion of the United States on these federal issues may be summarized as follows:

(1) The transaction underlying plaintiff's claim was prohibited by Executive Order 8389, as amended, and rules and regulations issued pursuant thereto, except as licensed or otherwise authorized by appropriate federal authorities.

(2) Plaintiff's claim and the transaction underlying it have never been licensed.

(3) Accordingly, plaintiff acquired no rights of any kind in or to the assets of the Agency held by the Superintendent.

On the first two issues the New York Court of Appeals adopted the position which we urge. On the third issue, however, the Court appears to have rejected this position by holding that the plaintiff has an accrued and established claim against the Agency's assets subject only to the necessity of a license authorizing payment of the claim. We shall discuss these issues in the order stated.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The relevant provisions of Section 5 (b) of the Trading With the Enemy Act, as amended, 54 Stat. 179, 55 Stat. 839, 50 U. S. C. App. § 5 (b), and executive orders, rulings and regulations issued thereunder, are set out in the Appendix to the Superintendent's Brief.

ARGUMENT

I. The transaction underlying plaintiff's claim was prohibited by Executive Order 8389 and regulations issued pursuant thereto

The transaction with the New York Agency upon which the Court of Appeals rested its holding that plaintiff has an allowable claim as a matter of state law was described by that court on the first appeal in this case in the following terms (R. 528):

> When on August 27, 1941, Yokohama Specie at its home office in Japan accepted funds from Standard it thereby became indebted to Standard in the amount then deposited. When on August 29, 1941, following instructions from Standard, and acting under its New York license, Yokohama Specie transmitted those funds by cable from Japan to its New York Agency, we think the consequent oral and written communications, to which reference has been made, by which the New York Agency advised Standard that it was in funds from its Yokohama home office which it was instructed to pay to Standard—served to create an enforcible legal obligation by the New York Agency to make such payment.

And on the second appeal the New York court again indicated that it regarded the transaction

as including a "transmittal of funds" (R. 534), a "transfer of funds" (R. 536). It pointed out that the transfer "involved the foreign offices of the Yokohama Bank and Standard's Japanese office, both nationals of Japan, and was to be performed at the direction of the foreign bank" (R. 536), and that the freezing regulations became effective in respect of the property of Japanese nationals "a month before the acts underlying plaintiff's claim were performed" (R. 531). Accordingly, it held that the underlying transaction was "a prohibited transfer" (R. 534, 536).

We think this holding was clearly correct. Executive Order 8389 was extended to property of Japanese nationals on July 26, 1941 (Executive Order 8832, 6 F. R. 3715). On the basis of the events that had occurred up to and including that date plaintiff would have had no conceivable claim to payment out of this liquidation. Its claim necessarily depends for its effectiveness on events occurring after the freeze date—in particular, on communications by the Japanese office of the Bank to the New York Agency and by the Agency to Standard's New York office in the latter part of August 1941. These, in the view of the Court of Appeals, "served to create an enforcible legal obligation by the New York Agency." Thus in essence plaintiff is claiming that as a result of transactions occurring after the freeze date it acquired a right against funds in

New York which it would not otherwise have had.[1]

In *Propper* v. *Clark*, 337 U. S. 472, 484, this Court pointed out that one of the underlying purposes of the freezing controls was to immobilize foreign assets until such time as it could be determined whether it was necessary in the national interest to vest them. This Court said:

> The freezing order of June 14, 1941, immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license, until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected.

[1] In an effort to escape this conclusion plaintiff has placed great emphasis on certain forward foreign exchange contracts entered into in February and March 1941. None of the New York courts appear to have regarded those contracts as forming an essential part of the "acts underlying plaintiff's claim." In any event the fact that steps may have been taken before the freeze date to put into motion the underlying transaction is no more significant here than was the fact in *Propper* v. *Clark*, 337 U. S. 472, that steps looking toward the appointment of a permanent receiver were taken prior to the freeze date. The controlling question is whether rights had been acquired prior to the freeze. Since the New York statute requires a transaction with the New York Agency, and since the only point at which that Agency became involved was the receipt and acknowledgment by it, on August 29, 1941, of instructions by the Japanese office, it is plain that no rights against the Agency could have been acquired prior to that date.

These considerations are fully applicable here. The assets of the New York Agency, being Japanese owned, became enemy property on December 7, 1941, and have subsequently been vested (R. 485). As vested property, those assets (to the extent that they are not subject to claim under the Trading With the Enemy Act (see Sections 9 (a), 32, 34)) are to be available for affirmative use "in the interest of and for the benefit of the United States" (Trading With the Enemy Act, Section 5 (b)).[2] Accordingly, the federal government had the strongest reasons for prohibiting (except as licensed) the acquisition after the freeze of any rights in or to the assets of the Agency. It was only as the federal authorities expressly approved them by issuance of a license that post-freezing transactions could be allowed to form the basis for accrual of rights which would, *pro tanto*, destroy the availability of the assets of the Agency to the United States "for prosecution of the threatened war or to compensate our citizens or ourselves for the damages

[2] In the War Claims Act of 1948, 62 Stat. 1240, 1247, Congress made vested German and Japanese enemy property available for payment of war claims of American citizens. Compare the Final Act of the Paris Conference on Reparations from Germany, U. S. Treaty Series, No. 1655 (State Department, 1946) in which the United States undertook that German enemy property within its jurisdiction which might otherwise be claimed from Germany. See, generally, Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 Har. L. Rev. 721, 743–4 (1949).

done by the governments of the nationals affected." *Propper* v. *Clark, supra.*

This conclusion is confirmed by examination of the text of Executive Order 8389. Section 1 of that Order prohibits any of a series of enumerated categories of transactions if they are pursuant to the direction of a blocked national or involve property of such a national—a requirement plainly satisfied here by the Japanese nationality of Standard's Japanese office, of the home office of the Bank, and of the New York Agency. As this Court said in *Propper* v. *Clark, supra,* the categories of transactions enumerated in the Order are "so all-inclusive as to make it clear that the purpose was to require transactions involving property of nationals of designated foreign countries to be carried out under regulations of this Government . . ." (337 U. S., at 480).[3] Hence, it is not surprising that the present transaction comes within a number of those categories. As the Superintendent has demonstrated (pp. 16–20 of his Brief), not only was payment to plaintiff or his assignor prohibited by Section 1 B, but the underlying transaction was a "transfer of credit" (Section 1 A), a "transaction in foreign exchange" (Section 1 C), and a dealing in "evidences of indebtedness" (Section 1 E), all of

[3] The Court indicated that the only exceptions to this all-inclusive prohibition consist of "transfers by operation of law" as defined in Treasury General Ruling No. 12, 7 F. R. 2991.

which were prohibited by the Order. It also involved the transfer of an interest in blocked property which came within the prohibitions of Treasury General Ruling No. 12, 7 F. R. 2991. As the New York court said, "A survey of the underlying facts leaves no doubt that plaintiff's claim rests upon a transaction which was subject to the licensing requirements" (R. 531).[4]

II. Neither the effectuation of the transaction underlying plaintiff's claim nor the payment of that claim has ever been licensed

Immediately upon the receipt of telegraphic instructions from its home office on August 29, 1941, Standard applied for a license permitting payment to it and the making of appropriate book entries to reflect the transaction. (D. Ex. F., R. 417.) On January 14, 1942, this application was denied by the Federal Reserve Bank of New York "in accordance with instructions of the

[4] Plaintiff has placed some reliance on Section 7 (b) of the Act. That Section was adopted in 1917. The portion of it relied upon by plaintiff (See Brief in Opposition in No. 512, p. 4) at most provides that certain payments may be made *if licensed*. Since we have no doubt that the plaintiff's claim can be paid, if licensed, and also no doubt that such payment has not been licensed, we fail to see what relevance this provision can have. In any event, however, if any conflict were here presented between this provision and the powers conferred by Section 5 (b), as amended in 1940 and 1941, Section 5 (b), as the later enactment, would necessarily control. See *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, holding that conflicting provisions of the Act must be "harmonized" in a fashion "which helps the amendment of 1941 fulfill its mission."

Treasury Department." (D. Ex. I., R. 426.) A second license application was filed by Standard on December 29, 1941 (D. Ex. E., R. 412); this application was denied on January 13, 1942 (D. Ex. H., R. 425). As we indicated in the memorandum which we filed with this Court in support of the petitions in Nos. 512 and 513, a further application by the plaintiff or its assignor was recently invited by the Department of Justice. That application has also been denied by letter of the Acting Director, Office of Alien Property, dated March 16, 1950 (see Appendix, p. 27).

Notwithstanding the fact that every specific license application filed by it has been denied, plaintiff nevertheless contends that payment of its claim has been licensed by certain general letters and instructions issued by the Secretary of the Treasury or the Alien Property Custodian. In considering the documents upon which plaintiff relies for this contention, we wish to emphasize the observation of the New York Court of Appeals that the payment of the claim "is but an incident" of the underlying transaction (R. 536) and that it is accordingly necessary to show that the federal authorities intended to license the underlying transaction. Examination of the federal documents relied upon makes it clear that this was not their intent. Their purpose was rather to provide general authorization for the ordinary acts incident to liquidation of

the Agency. Nothing in those documents purports to afford a retroactive validation of any transaction.[5]

Thus, the Treasury license of January 14, 1942 (Pl. Ex. 15, R. 375–377, set out at p. 36 of the Superintendent's Brief) merely authorized the general performance of acts "appropriate to the orderly liquidation" of the Agency. Moreover, it expressly provided that "transactions involving a blocked national other than the bank in liquidation shall be effected only as authorized by a general or specific license"—a proviso plainly applicable here, since the transaction involved Standard's Japanese office and the home office of the Bank, both blocked nationals other than the bank in liquidation. It is a patent absurdity to contend that this license, issued within two days of the denials of specific applications by the Agency and Standard, was intended by implication to grant the authorization twice specifically denied.

The other Treasury document involved, the letter of October 29, 1942 (Pl. Ex. 17, R. 380, Superintendent's Brief, p. 38), is in terms limited to an authorization to engage in transactions "on or after October 29, 1942" and cannot possibly be read as validating transactions occurring more

[5] The New York Court of Appeals has demonstrated this in detail. Accordingly, in the subsequent discussion we shall be summary, referring this Court to the opinion below and the Superintendent's Brief for the texts of the documents and a more detailed exposition of their terms.

than a year earlier. Moreover it authorizes at most transactions "which might be engaged in without a specific license of the Treasury Department by a person who is not a national of any blocked country." It is clear that a domestic bank would not have been authorized without a specific license to engage in transactions with a bank in Japan and with a Japanese branch of a business enterprise. The Treasury letter thus did not purport to authorize the Agency to engage in any transaction with the home office of the bank or with Standard's Japanese branch.

The Treasury letter, moreover, was not primarily intended as a license but was meant to signal the transfer of primary jurisdiction over the affairs of the Agency to the Alien Property Custodian. Thus, it refers at the outset to the Custodian's Supervisory Order of September 28, 1942, states that the authorization which it purports to confer is granted "in view of such order", and then suggests that the Agency communicate with the Office of the Alien Property Custodian concerning the applicability of orders, rulings, and regulations of that Office.

The plaintiff has urged that the apparent reservation of authority made in the Treasury letter of October 29 was without legal effect, and that that letter in fact amounted to a complete removal of all Treasury control over the liquidation of the Agency and transactions involving the Agency. The New York Court of

Appeals saw no necessity to pass on any question of the respective functions of the Secretary and the Custodian in this situation, and we perceive no reason why this Court should be called upon to consider that question. Nothing that has been done by the Alien Property Custodian or the Attorney General as his successor purported to give general validation to transactions which Executive Order 8389 declared to be null and void, or to authorize payment of claims based on such transactions. It plainly cannot be asserted that the Custodian or the Attorney General has authorized this particular transaction. Since neither the Custodian nor the Attorney General has ever licensed the transaction underlying plaintiff's claim, there is no occasion to consider the question whether such a license would have been sufficient or whether approval by the Treasury Department was also necessary.

The documents issued by the Custodian to which the plaintiff refers in this connection contain no suggestion that the shift of control from the Treasury to the Custodian was intended to result in a basic change in governmental policy and a blanket authorization of transactions theretofore prohibited. On the contrary, the Custodian's letter to the Superintendent of September 28, 1942 (Pl. Ex. 16, R. 378–379) declares that "for the present, it is contemplated that you shall continue to retain possession of and liquidate" the

Agency. It goes on to impose *more* stringent restrictions on the payment of claims than had existed under the Treasury supervision by requiring that all claims be submitted to the Custodian prior to payment in order that the Custodian might take "whatever action he may deem necessary or advisable" R. 579).[6] That the Custodian had no intention of relaxing existing prohibitions is also shown by his adoption of regulations which prohibited, except as authorized by him

> all transactions * * * by, or with, or on behalf of, or pursuant to the direction of, any business enterprise of which [the Custodian has] undertaken the supervision * * * or involving any property in which such business enterprise has any interest. [Certificate of Appointment of S. James Crowley and Edward C. Tefft, 7 F. R. 8910; General Order No. 31, 9 F. R. 7739; Rules and Regulations of Office of Alien Property, Sec. 505.1, 13 F. R. 9508.]

In short, plaintiff's assertion that his claim had been licensed is entirely without support in the documents on which he relies. Its adoption would, moreover, result in a strange anomaly. If Standard had sought to carry out the very transaction here involved through a domestic bank,

[6] The other two documents referred to by the plaintiff in this connection, the supervisory order and vesting order issued by the Custodian, are documents asserting jurisdiction and cannot possibly be read as licenses authorizing prohibited transactions.

acting as correspondent of a Japanese bank, there can be no possible doubt that a special license would have been required. Thus, to permit recognition of the plaintiff's claim here without such a special license would be to impose fewer restrictions on transactions effectuated through an enemy-controlled agency than were placed on those effectuated through a domestic bank, and to discriminate against persons who had dealt through a domestic bank in preference to an agency of an enemy bank.

Our position is well summarized by the words of the New York Court (R. 538):

> The conclusion which we thus reach—that payment of plaintiff's claim has not been licensed—is compelled, then, not only by the theory and rationale of our earlier decision in this matter, not only by the tenor of the orders and communications of the Treasury Department and of the Custodian, but also by the basic scheme and the ultimate objectives of the program carefully worked out by the Federal Government for the control of enemy alien and other foreign funds. The consistent design of that program is to prevent the fruits of prohibited transactions from being harvested until the underlying dealings are screened and found to be consonant with the national interests. The entire program, its purpose and its design, would be completely upset and nullified if we were

to give to the documents before us the carte blanche licensing effect sought by plaintiff. Such a decision would place in the same category, on a par, all sorts of foreign exchange contracts emanating from blocked nations during the pre-hostilities period, and it would validate, willy-nilly and in gross, all such transfers, irrespective of how illegal may have been their source, regardless of how illicit may have been their purpose. The language of the papers before us cannot be read to produce such a result.

III. Accordingly, plaintiff acquired no rights of any kind in or to the assets of the Agency held by the Superintendent

If we are correct in what we have said thus far, it is clear that the plaintiff's claim rests upon a prohibited transaction which has not been licensed. In our view, such a transaction cannot afford the basis for assertion by the plaintiff of a right of any kind to the assets of the Agency now held by the Superintendent. This necessarily follows from the fact that the Executive Order, as we have seen, prohibits much more than payment based on an unlicensed transaction; it prohibits the creation of any obligation or the accrual of any rights to blocked property as a result of such a transaction.

The New York Court of Appeals, however, did not so hold. As we read its opinion and judgment it held that, notwithstanding the absence

of a license, plaintiff's claim could accrue and he could acquire the status of an established creditor entitled to preference under the New York Banking Law. It appears to have held that only the right to payment was subject to licensing requirements. Thus on the first appeal the Court declared that the various communications "served to create an enforcible legal obligation by the New York Agency to make * * * payment" (R. 528). And it added, "the fact that Federal regulations governing transactions in foreign exchange prevent the payment to Standard until a license under Executive Order 8389, as amended, is procured does not make conditional the obligation of the New York Agency to pay" (R. 528). In the briefs on the second appeal the court's attention was called to the fact that this holding had been expressly disapproved by the Court of Appeals for the Second Circuit in *Clark* v. *Propper*, 169 F. 2d 324, 327. And by motion for reargument the court's attention was called to the decision of this Court in the *Propper* case which also clearly disapproved the holding of the New York Court.[7] Nevertheless the court, without refer-

[7] This Court said (337 U. S. at 484–5):

"We assume that the Court of Appeals of New York held in *Singer* v. *Yokohama Specie Bank* that title to blocked assets could pass without license from a statutory receiver to a creditor. As the Trading with the Enemy Act is federal legislation founded on federal constitutional provisions, how-

ring to the *Propper* decision, cited its prior decision as holding that creation of "an enforcible legal obligation by the New York Agency" was created and said merely that "we were careful to provide that plaintiff's payment was to be conditional on his obtaining a Treasury license" (R. 532–533). In its amended remittitur (R. 541) it directed the entry of a judgment that the plaintiff recover of the Superintendent the sum of $557,061.25, "which sum shall constitute a preferred claim payable out of the assets of [the Agency], the payment of which, however, is subject to the provisions of Executive Order 8389, as amended, and the rules and regulations issued pursuant thereto." Moreover, the remittitur recites that the provisions of the freezing regulations "did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely

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ever, the United States has authority to make all laws necessary and proper for carrying the power into execution. The power to enact carries with it final authority to declare the meaning of the legislation. *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95. Federal courts have so held as to this issue in this case, 169 F. 2d 324, 327, and in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche etc.*, 173 F. 2d 71, 73. The Trading with the Enemy Act is national in range. The effect of a federal freezing order should be the same on subsequent transfers of title in all states. State law determines the effect of the appointment of a receiver on title to the property administered, but federal law determines whether the event of appointment can free the property from the prior control. Cf. *Lyeth* v. *Hoey*, 305 U. S. 188, 191, *et seq.*"

prevented the payment of the claim until an appropriate federal license is obtained" (R. 542).

As we read these holdings—and the parties seem to be in agreement as to this—they declare that rights of some kind were acquired by the unlicensed transaction, and that the effect of the Executive Order was merely to prohibit payment. It is true that the court declared that "the consistent design [of the freezing program] is to prevent the fruits of prohibited transactions from being harvested until the underlying dealings are screened and found to be consonant with the national interests." But the judgment of the New York court appears to us to give the plaintiff some of the fruits of the unlicensed transaction. Perhaps he may not eat those fruits without a federal license, but the court would apparently sanction the placing of them in storage for him.

These adjudications are clearly inconsistent with the objectives and purposes of the freezing controls and with the decision of this Court in the *Propper* case. Plaintiff in that case was a receiver appointed by a state court after the freeze date. By virtue of his appointment he claimed title to the local assets of a blocked Austrian national. He argued that the freezing order did not prohibit the unlicensed transfer of those assets to him and that the purposes of the order could be fully satisfied by the requirement of a license for any payment of those assets to claimants (337 U. S. at 482–3). This Court held

unequivocally, however, that "the freezing order * * * immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license * * *" (337 U. S. at 484) and that the order accordingly prohibited not only payment of blocked assets but also "shifts in title to blocked assets" and "transfers of * * * credit" (337 U. S. at 486). This Court noted the instant case ("We assume that the Court of Appeals of New York held in *Singer* v. *Yokohama Specie Bank* that title to blocked assets could pass without license from a statutory receiver to a creditor") and clearly indicated its disapproval (337 U. S. at 484–5).[8]

The difference between the position of the New York Court of Appeals and the position of this Court as expressed in the *Propper* case is emphasized by a consideration of the practical consequences which would flow from the decision below. Under the New York court's decision, the Agency is subject to an "enforcible legal obligation" to pay $557,561.25, and the plaintiff has the status of an established claimant in that

[8] For like decisions of lower federal courts see *Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, 173 F. 2d 71 (C. A. 2d); *The Kotkas*, 35 F. Supp. 983 (E. D. N. Y.); *Okihara* v. *Clark*, 71 F. Supp. 319 (D. Hawaii); *Clark* v. *Chase National Bank*, 82 F. Supp. 740 (S. D. N. Y.); *Heyden Chemical Corp.* v. *Clark*, 85 F. Supp. 949 (S. D. N. Y.); cf. *Blank* v. *Clark*, 79 F. Supp. 373 (E. D. Pa.)

amount. That status would appear to give him a present right *in rem* against the assets in the hands of the Superintendent. *People* v. *American Loan & Trust Co.*, 172 N. Y. 371, 377, 378; *Lafayette Trust Co.* v. *Beggs*, 213 N. Y. 280, 290 (concurring opinion). Cf. *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 412. This in turn creates the following serious difficulties, all of which would be avoided by holding, as we think the *Propper* case requires, that no rights of any kind were obtained by plaintiff as a result of the unlicensed transaction.

(1) The plaintiff is in a position to assert that the Superintendent is obliged to retain a reserve sufficient to pay his claim. While we do not believe that such an assertion could prevail against the Custodian's right to demand the transfer to him of the assets underlying that claim,[9] the making of any such assertion would unquestionably impede and subject to the delays of litigation any attempt by the Custodian to reduce to possession the assets now held by the Superintendent as a reserve for the plaintiff's claim. Under the *Propper* decision, however, plaintiff has no right of any kind in or to those assets and hence no possibility of standing to object to a transfer of them to the Custodian.

[9] See *Silesian American Corporation* v. *Clark*, 332 U. S. 469; *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Matter of Daly*, 189 Misc. 680, 74 N. Y. Supp. 2d 711 (1947); *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N. Y. Supp. 2d 289 (1946).

(2) Assuming that possession of those assets is obtained by the Custodian, the plaintiff would be in a position to assert that the decision of the New York Court of Appeals had confirmed in him a right *in rem* to those assets which could be asserted as a title claim against the Attorney General under the Trading with the Enemy Act, as amended (Trading With the Enemy Act, Sections 9, 32). Under the *Propper* decision, however, the plaintiff would have no conceivable basis for assertion of such a title claim.

(3) Assuming that plaintiff could not prevail as a title claimant, he (or his assignor) could undoubtedly assert a debt claim under Section 34 of the Act. Under the New York decision he would have basis for assertion that the Agency had incurred a binding legal obligation to pay the dollar amount stated in the judgment below, and that his debt claim is properly measured by that obligation. Under the *Propper* decision, however, it is clear that no obligation on the part of the Agency was ever created and that plaintiff's claim must be based on whatever rights he may have acquired against the home office in Japan.[10]

Plaintiff may argue that Paragraph 4 of Treasury General Ruling 12, 7 F. R. 2991, constituted

[10] Such a claim would presumably be based on the yen amount deposited with that office; it would, of course, be convertible into dollars, but the appropriate exchange rate might be very different from that prevailing on August 29, 1941. Cf. *Hicks* v. *Guinness*, 269 U. S. 271.

a license by the Treasury which authorized the court to make the adjudications to which we have referred. That Ruling does in some degree constitute an authorization to the courts. But the scope of the judicial action relating to unlicensed transactions which it authorizes is clearly stated in the Ruling itself. In the first place the Ruling expressly prohibits unlicensed transfers of blocked property (Par. 1) and includes among the prohibited transfers "the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order." (Par. 5). And Paragraph 4 of the Ruling imposes sharp limitations on the permissible scope of judicial action by providing that

> no attachment, judgment, decree, lien, execution, garnishment or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

This prohibition was again emphasized by the Treasury Department in Public Circular No. 31, 11 F. R. 8351. The Treasury Department there stated that the Ruling

> prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process

> could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recognition of any other right, remedy, power, or privilege with respect to the property."

It is obvious that if General Ruling No. 12 constitutes a license by the Treasury Department, the scope of the license must be measured by the limitations which the Treasury Department expressed in the Ruling and has since reiterated. To the extent that the decision of the Court of Appeals purports to give present legal effect to an unlicensed transaction and to declare the existence of present rights and obligations on the basis of such a transaction, its decision violates the freezing order and the interpretation of that order heretofore approved by this Court. Plainly, after freezing and in the absence of a license the parties could not have

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[11] In *Clark* v. *Propper*, 169 Fed. 324, 327, the Court of Appeals for the Second Circuit stated "We agree with this interpretation."

See also Press Release No. 34, April 21, 1942, U. S. Treasury Department, *Documents Pertaining to Foreign Funds Control* (1946), pp. 71, 73; Public Circular No. 31, August 2, 1946, 11 F. R. 8351, App., pp. 67–68; letter by Randolph E. Paul, General Counsel of the Treasury Department, published in *American Banker*, December 11, 1942, p. 3, col. 2; Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947); Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemp. Problems 17, 44–49 (1945); and Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N. Y. L. J. 2180, 2200 (1945).

created by their voluntary acts an enforcible legal obligation of the Agency to pay the sum here in issue. It is equally plain that in the absence of a license judicial action may not be allowed to have that effect. Indeed, to construe General Ruling No. 12 otherwise would be to impute to the federal authorities an extraordinary willingness to "furnish a means of evasion by which the impact of freezing controls could be avoided by recourse to judicial proceedings". *Clark* v. *Propper*, 169 F. 2d 324, 327 (C. A. 2). As we have seen, those controls were aimed at denying all legal effect to transactions coming within the scope of Executive Order 8389 except as those transactions might be approved by federal authorities as not inconsistent with the freezing program. It was the federal authorities, and they alone, who were competent to pass on the question of consistency with the objectives of the freezing program. There is no possible warrant for suggesting that the Treasury meant to delegate that function to the courts, or indeed to the parties in proceedings consummated by consent or default. Hence, the proviso to General Ruling No. 12 must be given effect according to its terms so as to preclude any judicial action which would give effect to an unlicensed transaction by creating or recognizing present rights and liabilities founded upon such transaction. To the extent that the decision and judgment below give judicial enforcement to the transaction here involved by

declaring that it gave rise to an enforcible obligation of the Agency, they exceed that limitation.

CONCLUSION

For the foregoing reasons the judgment should be affirmed on the issues presented in No. 527. On the issue presented in No. 512 the judgment should either be reversed or be so modified as to make it clear that the plaintiff has acquired no rights of any kind against the Agency or the assets of the Agency in the hands of the Superintendent.

Respectfully submitted,

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APRIL, 1950.

APPENDIX

MARCH 16, 1950.

CRAVATH, SWAINE & MOORE, ESQS.

15 Broad Street

NEW YORK, N. Y.

Attention: *Albert R. Connelly, Esq.*

Re: Application of Eugene T. Singer and Standard-Vacuum Oil Company for a License under the Trading with the Enemy Act.

GENTLEMEN: On or about September 2, 1941, Standard-Vacuum Oil Company filed an application dated August 29, 1941, (No. NY 235383), with the Treasury Department. This application was supplemented by a new application by Standard-Vacuum Oil Company dated December 29, 1941, (No. NY 334372). These applications were denied by Treasury on or about January 12, 1942.

Since the record did not make clear whether these denials were final denials on the merits, you were invited by letter of this Office, dated January 23, 1950, to file an application for a license or authorization under the Trading with the Enemy Act, as amended, (50 U. S. C. App. 1–39), relating to your clients' claim against the Yokohama Specie Bank. By letter dated January 30, 1950, on behalf of your clients, Eugene T. Singer and Standard-Vacuum Oil Company, you applied for a license:

(i) authorizing the payment to Eugene T. Singer of the sum of $557,561.25 from the assets of the Yokohama Specie Bank, Ltd., in the possession of the Superintendent of Banks of the State of New York, as liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd., together with any further sums which may be due in respect of said principal amount or in respect of the judgment of the Supreme Court of the State of New York, entered November 25, 1949, in the action entitled *Eugene T. Singer* v. *The Yokohama Specie Bank, Ltd., and Elliott V. Bell, etc.* (Index No. 1320-1944);

(ii) authorizing said Eugene T. Singer and Standard to regard said sums so transferred as property in which no blocked country or national thereof has or has had any interest; and

(iii) retroactively authorizing such of the transactions * * * [described in paragraphs 1 to 13 of your letter of January 30, 1950] as may be regarded by the Office of Alien Property as licensable transactions under Executive Order No. 8389, as amended.

In considering this application the transactions underlying your clients' claim are deemed to be transactions prohibited, except as specifically authorized, within the purview of section 1 of Executive Order No. 8389, as amended, paragraphs A, B, C and E and General Ruling 12, sections 1, 2 and 5.

In passing on the application due consideration has been given the facts and arguments presented in the above-mentioned license applications, the discussions which took place at the conferences at

this Office between Mr. Albert R. Connelly of your firm, Mr. George Collins, an attorney on the staff of Standard-Vacuum Oil Company, and Mr. John Ward Cutler, representing the applicants, and members of the staff of this Office, the discussion which took place at the meeting I and members of my staff had with Mr. Cutler, and the memorandum and other documents submitted by you. On the basis of the facts and considerations thus developed, together with the facts and the law as developed in the litigation entitled "*Singer* v. *Yokohama Specie Bank, Ltd., and Elliott V. Bell, etc.*", and pursuant to authority under the Trading with the Enemy Act, as amended, *supra*, Executive Order No. 8389, as amended, (3 CFR, 1943 Cum. Supp.), Executive Order No. 9095, as amended, (3 CFR, 1943 Cum. Supp. and 3 CFR, 1945 Supp.), delegated to me by Executive Order No. 9788 (3 CFR, 1946 Supp.), Executive Order 9989, (3 CFR, 1948 Supp.), and Paragraph I (b) (1) of Statement of Organization and Delegation of Final Authority (13 F. R. 9605), and pursuant to Rules of Office of Alien Property, Department of Justice (8 CFR 505.1), I hereby deny the application made on behalf of Eugene T. Singer and Standard-Vacuum Oil Company by your letter dated January 30, 1950, referred to above, for a license retroactively authorizing the transactions on which the claim of Eugene T. Singer against the Superintendent of Banks of the State of New York is based, and, accordingly, I deny a license authorizing payment to be made to Mr. Eugene T. Singer of the sum of $557,561.25, or of any other sums, payment of which is sought in paragraph (i) of your letter of January 30,

1950. It follows that paragraph (ii) of that application is also denied.

It is my intention that this denial shall be final in the absence of a showing of new evidence or considerations which, for good cause, were not previously presented to this Office.

Sincerely yours,

[Signed] Harold I. Baynton,
HAROLD I. BAYNTON,
Acting Director, Office of Alien Property,
Department of Justice.

cc—Edward Feldman,
John Ward Cutler.

U. S. GOVERNMENT PRINTING OFFICE: 1950